

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*

Defendants.

Case No. 17-497-RAJ

ORDER

This matter comes before the Court on Defendants Donald J. Trump, Jefferson B. Sessions, III, and John F. Kelly’s (the “Government”) Motion to Dismiss the First Amended Complaint. Dkt. # 34. This motion is nearly identical to one the Government filed in *County of Santa Clara v. Trump, et al.*, No. 3:17-cv-00574-WHO (N.D. Cal. filed Feb. 3, 2017). With this in mind, and having reviewed the parties’ briefs and balance of the record, the Court finds oral argument unnecessary. For the reasons that follow, the Court **DENIES** the Government’s motion.

I. BACKGROUND

A. The Executive Order

On January 25, 2017, President Donald J. Trump issued Executive Order No. 13768, “Enhancing Public Safety in the Interior of the United States.” 82 Fed. Reg. 8799 (Jan. 25, 2017) (“Executive Order” or “EO”). The Executive Order announced policies and priorities concerning the enforcement of federal immigration laws. Section 9(a) of the Executive Order regards the eligibility of “sanctuary jurisdictions” to receive federal

1 funding. Specifically, section 9(a) provides:

2 In furtherance of this policy, the Attorney General and the
 3 Secretary, in their discretion and to the extent consistent with
 4 law, shall ensure that jurisdictions that willfully refuse to
 5 comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not
 6 eligible to receive Federal grants, except as deemed necessary
 7 for law enforcement purposes by the Attorney General or the
 8 Secretary. The Secretary has the authority to designate, in his
 9 discretion and to the extent consistent with law, a jurisdiction
 as a sanctuary jurisdiction. The Attorney General shall take
 appropriate enforcement action against any entity that violates
 8 U.S.C. 1373, or which has in effect a statute, policy, or
 practice that prevents or hinders the enforcement of Federal
 law.

10 EO § 9(a). The Executive Order does not define “sanctuary jurisdiction” and does not
 11 expand upon what constitutes “willfully refus[ing] to comply with” Section 1373.

12 The Executive Order aims to prevent certain jurisdictions from receiving federal
 13 funds if they fail to comply with 8 U.S.C. § 1373. In relevant part, Section 1373
 14 provides:

15 Notwithstanding any other provision of Federal, State, or local
 16 law, a Federal, State, or local government entity or official may
 17 not prohibit, or in any way restrict, any government entity or
 18 official from sending to, or receiving from, the Immigration
 and Naturalization Service information regarding the
 citizenship or immigration status, lawful or unlawful, of any
 19 individual.

20 8 U.S.C. § 1373(a). Section 1373 makes no mention of federal funds, as either conditions
 21 of compliance or as consequences of violation.

22 **B. The Cities’ Policies**

23 Both Seattle and Portland (“Plaintiffs” or “Cities”) pride themselves on their status
 24 as welcoming and internationally minded cities. Dkt. # 27 (FAC) at ¶¶ 21, 22, 36. To
 25 this end, Seattle enacted Ordinance 121063, “which provides that . . . unless otherwise
 26 required by law or by court order, ‘no Seattle City officer or employee shall inquire into
 27 the immigration status of any person, or engage in activities designed to ascertain the

1 immigration status of any person.” *Id.* at ¶ 25 (quoting Seattle Mun. Code §
2 4.18.015(A)). In addition, the Seattle Police Department Manual explains that “[b]eing
3 an undocumented person in this country, barring any criminal activity, is a federal civil
4 violation not enforced by the Seattle Police Department.” *Id.* at ¶ 31 (citing Seattle
5 Police Dep’t Manual § 6.020). The Seattle Police Department will not enforce federal
6 laws relating to illegal entry and residence, leaving such enforcement responsibility to
7 Immigration and Customs Enforcement (ICE). *Id.*

8 Portland enacted similar ordinances. For example, ORS 181A.820 “prohibits state
9 and local law enforcement from using moneys, equipment, or personnel for the purpose
10 of detecting or apprehending persons whose only violation of law is that they are persons
11 of foreign citizenship present in the United States in violation of federal immigration
12 laws.” *Id.* at ¶ 37 (quotations omitted). Portland also adopted City Resolution 37277,
13 which states that “the City will continue to, in a manner consistent with state and federal
14 law, prohibit the use of City funds, personnel or equipment to enforce federal
15 immigration law.” *Id.* at ¶ 41 (quotations omitted). Portland’s Police Department “will
16 not assist ICE unless a crime is committed or in case of an emergency.” *Id.* at ¶ 40.

17 **C. The Cities’ Federal Funding**

18 Both Seattle and Portland rely heavily on federal funds for their operating budgets.
19 For fiscal year 2017, Seattle has an operating budget of \$5.71 billion, of which \$55
20 million is derived from federal funds. *Id.* at ¶ 61. In addition, “[t]he federal government
21 is contributing over \$99 million in [multi-year capital funds] to Seattle in 2017.” *Id.*
22 “Between both capital and operating funds, [Seattle] will receive over \$155 million from
23 the federal government in 2017.” *Id.* Much of the federal funding is provided to Seattle
24 on a reimbursable basis for essential programs. *Id.* at ¶ 62.

25 For the 2016-17 fiscal year, Portland had an operating budget of \$4.1 billion. *Id.*
26 at ¶ 83. Portland expects to receive nearly \$49 million in federal funds. *Id.* Similar to
27 Seattle, much of Portland’s funding is provided on a reimbursable basis. *Id.* at ¶ 84.

1 Many of those funds are used for essential programs. *Id.* at ¶ 85.

2 **D. Public Statements by the Government**

3 On May 31, 2016, the Inspector General of the Department of Justice (DOJ)
4 issued a memorandum in which he found that “policies prohibiting local officials from
5 sharing information with the federal government are ‘inconsistent with plain language of
6 Section 1373.’” *Id.* at ¶ 98 (citations omitted). The Inspector General further found that
7 cities may violate Section 1373 even if such policies do not exist but where “‘actions of
8 local officials result in prohibitions or restrictions’ on information-sharing.” *Id.* at ¶ 99
9 (citations omitted). However, he confirmed that Section 1373 did not require cities to
10 disclose immigration status information or cooperate in any other way with ICE. *Id.* at ¶¶
11 98, 101, 103.

12 The President, both during his campaign and since his election, has made
13 comments evidencing his desire to deny funding to sanctuary cities. *Id.* at ¶ 129 (saying
14 he “would withhold federal funds to punish so-called sanctuary cities.”). The President
15 specifically referred to Seattle as a sanctuary city, and said that “sanctuary cities are out
16 . . . sanctuary cities are over.” *Id.* at ¶¶ 131, 132. The President has been clear that his
17 interpretation of ending sanctuary cities means defunding those cities. *Id.* at ¶ 135.

18 The President’s press secretary “insisted that ‘the President is going to do
19 everything he can within the scope of the executive order to make sure that cities who
20 don’t comply with it—counties and other institutions that remain sanctuary cities don’t
21 get federal government funding in compliance with the executive order.’” *Id.* at ¶ 138
22 (citations omitted). The press secretary further stated that the Government would “strip
23 federal grant money from sanctuary states and cities that harbor illegal immigrants.” *Id.*

24 The Attorney General urged Congress to pass legislation that would “cut off
25 relevant federal monies to sanctuary cities.” *Id.* at ¶ 139. During a White House Press
26 Briefing, the Attorney General clarified that “jurisdictions seeking or applying for
27 Department of Justice grants [need to] certify compliance with 1373 as a condition of

1 receiving those awards.” *Id.* at ¶ 140.

2 For several years, the Government has recorded jurisdictions “that fail to comply
3 with federal requests for assistance in enforcing the immigration laws.” *Id.* at ¶ 142.
4 Seattle often appears in these records “as a jurisdiction with a ‘sanctuary policy.’” *Id.*
5 (citations and alternation omitted). Similarly, counties in Oregon, including ones
6 associated with Portland, have been defined as “jurisdictions that refuse cooperation with
7 federal immigration authorities[.]” *Id.* at ¶¶ 144, 145.

8 **E. Current Lawsuits**

9 In early 2017, the City and County of San Francisco and the County of Santa Clara
10 filed suit against the Government in response to the Executive Order. *City and Cty. of*
11 *San Francisco v. Trump, et al.*, No. 3:17-cv-00485-WHO (N.D. Cal. filed Jan. 31, 2017);
12 *Cty. of Santa Clara v. Trump, et al.*, No. 3:17-cv-00574-WHO (N.D. Cal. filed Feb. 3,
13 2017). The parties sought injunctive and declaratory relief, and the Northern District of
14 California granted relief by entering a nation-wide injunction that barred the Government
15 from enforcing the Executive Order. *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-
16 WHO, 2017 WL 1459081, at *29 (N.D. Cal. Apr. 25, 2017), *reconsideration denied*, No.
17 17-CV-00485-WHO, 2017 WL 3086064 (N.D. Cal. July 20, 2017) (“*Santa Clara I*”). In
18 issuing the injunction, the court rejected the Government’s proffered arguments that “the
19 Executive Order is a mere directive to the Department of Homeland Security (“DHS”)
20 and DOJ that does not seek to place any new conditions on federal funds.” *Cty. of Santa*
21 *Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 3086064, at *1 (N.D. Cal. July 20,
22 2017) (“*Santa Clara II*”).

23 In response to the injunction, the Attorney General drafted a memorandum
24 attempting to narrowly interpret the Executive Order. Dkt. # 34-1. The memorandum
25 repeated the unsuccessful arguments made by the Government during the hearing, but
26 phrased them as “DOJ’s ‘conclusive’ interpretation of the Executive Order.” *Santa Clara*
27 *II*, 2017 WL 3086064 at *2. With the memorandum in hand, the Government sought

1 reconsideration of the Court’s order enjoining enforcement. The Northern District of
2 California did not find the memorandum to constitute a legal opinion, nor did it find the
3 memorandum binding on the agencies, and therefore denied the motion. *Santa Clara II*,
4 2017 WL 3086064 at *4-9 (finding, *inter alia*, that “[i]t is unnecessary to address the
5 merits of the interpretation outlined in the AG Memorandum because it is the same
6 interpretation the government proposed at oral argument; I have already assessed and
7 rejected it as not legally plausible.”).

8 On March 29, 2017, the City of Seattle filed a Complaint for Declaratory Relief
9 seeking a judgment from this Court that Seattle complies with 8 U.S.C. § 1373 and that
10 the Executive Order is unconstitutional under the Tenth Amendment and the Spending
11 Clause. On June 26, 2017, the Complaint was amended to include the City of Portland as
12 a plaintiff. This lawsuit is nearly identical to the one progressing in the Northern District
13 of California. At issue before the Court is the Government’s motion to dismiss Plaintiffs’
14 Amended Complaint.

15 **II. LEGAL STANDARD**

16 **A. FRCP 12(b)(1)**

17 Federal courts are tribunals of limited jurisdiction and may only hear cases
18 authorized by the Constitution or a statutory grant. *Kokkonen v. Guardian Life Ins. Co.*
19 *of America*, 511 U.S. 375, 377 (1994). The burden of establishing subject-matter
20 jurisdiction rests upon the party seeking to invoke federal jurisdiction. *Id.* Once it is
21 determined that a federal court lacks subject-matter jurisdiction, the court has no choice
22 but to dismiss the suit. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); Fed. R. Civ.
23 P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction,
24 the court must dismiss the action.”).

25 A party may bring a factual challenge to subject-matter jurisdiction, and in such
26 cases the court may consider materials beyond the complaint. *PW Arms, Inc. v. United*
27 *States*, 186 F. Supp. 3d 1137, 1142 (W.D. Wash. 2016) (citing *Savage v. Glendale Union*

1 *High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003); *see also McCarthy v. United States*,
2 850 F.2d 558, 560 (9th Cir. 1988) (“Moreover, when considering a motion to dismiss
3 pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings,
4 but may review any evidence, such as affidavits and testimony, to resolve factual disputes
5 concerning the existence of jurisdiction.”).

6 **B. FRCP 12(b)(6)**

7 Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a complaint for failure to state a
8 claim. The rule requires the court to assume the truth of the complaint’s factual
9 allegations and credit all reasonable inferences arising from those allegations. *Sanders v.*
10 *Brown*, 504 F.3d 903, 910 (9th Cir. 2007). A court “need not accept as true conclusory
11 allegations that are contradicted by documents referred to in the complaint.” *Manzarek v.*
12 *St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The plaintiff must
13 point to factual allegations that “state a claim to relief that is plausible on its face.” *Bell*
14 *Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). If the plaintiff succeeds, the complaint
15 avoids dismissal if there is “any set of facts consistent with the allegations in the
16 complaint” that would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S.
17 662, 679 (2009).

18 A court typically cannot consider evidence beyond the four corners of the
19 complaint, although it may rely on a document to which the complaint refers if the
20 document is central to the party’s claims and its authenticity is not in question. *Marder v.*
21 *Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may also consider evidence subject to
22 judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

23 **III. DISCUSSION**

24 **A. The Attorney General Memorandum (“AG Memo”)**

25 As a preliminary matter, the Government relies heavily on the AG Memo to
26 support its arguments, claiming the memo “sets forth in a formal, conclusive manner the
27 administration’s interpretation of the scope of the grant-eligibility provision of Section

1 9(a).” Dkt. # 34 at 13. Plaintiffs disagree that the AG Memo carries the force of law.
2 Dkt. # 38 at 13.

3 The Government asserts that “[b]y longstanding tradition and practices, the
4 Attorney General’s legal opinions are treated as authoritative by the heads of executive
5 agencies.” Dkt. # 34 at 13. But it is not apparent that the AG Memo is, itself, a legal
6 opinion. Titled “Implementation of Executive Order 13768 . . .”, Dkt. # 34-1, the AG
7 Memo sets forth its internal plans for enforcing the Executive Order. The AG Memo is
8 directed only to grant-making components within the DOJ and is rife with language of
9 enforcement, not language of interpretation. For example, Defendant Sessions writes that
10 “section 9(a) of the Executive Order . . . *will be applied* solely to federal grants
11 administered by the Department of Justice or the Department of Homeland Security[.]”
12 *Id.* at 1 (emphasis added). Defendant Sessions also writes that “the term ‘sanctuary
13 jurisdiction’ *will refer only to* jurisdictions that ‘willfully refuse to comply with 8 U.S.C.
14 1373.’” *Id.* at 3 (emphasis added). In the brief, two-page memo, Defendant Sessions
15 does not offer any legal interpretations or determinations that indicate the scope or
16 constitutionality of the Executive Order. He merely sets forth boundaries—arrived at in
17 response to pending litigation—by which he intends to enforce the Executive Order. The
18 AG Memo fails to meet traditional notions of what one would expect to constitute a legal
19 analysis.

20 The Government cites *Tenaska Washington Partners II, L.P. v. United States*, 34
21 Fed. Cl. 434, 439 (1995), for the proposition that the Court should treat the AG Memo as
22 an authoritative legal opinion. Dkt. # 34 at 13. But in *Tenaska*, the court made reference
23 to an Office of Legal Counsel (OLC) memorandum that was extensively researched, and
24 included input from several divisions, offices, and high-ranking officials within the DOJ.
25 *Tenaska*, 34 Fed. Cl. at 439. The OLC memo thoroughly analyzed the relevant legal
26 issues and offered a reasoned opinion as to the constitutional concerns present in that
27 case. *Id.* The Government’s use of *Tenaska* in this case is inapposite, where here the

1 two-page AG Memo offers little in the way of legal analysis or determination as to the
2 constitutionality or scope of the Executive Order.

3 The Government's cites to 28 U.S.C. § 512 and 28 C.F.R. § 0.5 are similarly
4 unavailing. As to the former, there is no evidence that "[t]he head of an executive
5 department" requested "the opinion of the Attorney General" on any question of law. *See*
6 28 U.S.C. § 512. "And while section 0.5(c) requires the Attorney General to provide
7 'formal and informal' advice and opinions 'on legal matters,' 28 C.F.R. § 0.5(c), it is
8 silent on whether any such advice would bind other agencies." *Santa Clara II*, 2017 WL
9 3086064 at *7. Therefore, the Court finds that the AG Memo is not a legal opinion and
10 therefore need not treat it as authoritative or binding on either the DOJ or the Department
11 of Homeland Security.

12 **B. Ripeness**

13 The Government first challenges Plaintiffs' claims on ripeness grounds. Dkt. # 34
14 at 16. The Government claims that Plaintiffs' claims rest on contingent future events,
15 especially in light of the fact that no action has been taken against them. *Id.* Plaintiffs
16 argue that they have made the requisite showing that their case is ripe. Dkt. # 38 at 21-
17 33.

18 The Ninth Circuit recognizes a constitutional and prudential component when
19 analyzing claims for ripeness. *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d
20 1134, 1138 (9th Cir. 2000). The "constitutional component of the ripeness inquiry is
21 often treated under the rubric of standing and, in many cases, ripeness coincides squarely
22 with standing's injury in fact prong." *Id.* In *Thomas*, the court analyzed the
23 constitutional component of standing by looking to "whether the plaintiffs have
24 articulated a 'concrete plan' to violate the law in question, whether the prosecuting
25 authorities have communicated a specific warning or threat to initiate proceedings, and
26 the history of past prosecution or enforcement under the challenged statute." *Id.* at 1139.
27 Plaintiffs' Amended Complaint satisfies each of these elements.

1 First, Plaintiffs articulated several ordinances¹ that the Government may consider
2 to be violations of Section 1373. Dkt. # 27 (FAC) at ¶¶ 23-30, 37-41. Considering the
3 broad strokes of the Executive Order, made broader by the AG Memo², these ordinances
4 will likely be read by the Government as “ways that state and local jurisdictions are
5 undermining our lawful system of immigration” Dkt. # 34-1 at 3.

6 Second, Plaintiffs list many direct threats that the Government has made to
7 enforce the Executive Order against Seattle and Portland. Dkt. # 27 (FAC) at ¶¶ 128-
8 146. Specifically, the current administration has made a concerted effort to publicize the
9 cities that it deems to be “sanctuary cities” as well as to make clear remarks as to its
10 intent to defund these cities. *See, e.g., id.* at ¶ 138 (quoting the President’s press secretary
11 as saying that the Government will “strip federal grant money from the sanctuary states
12 and cities”).³

13 Finally, Plaintiffs allege that the Government has already begun to implement the
14 Executive Order. Specifically, Plaintiffs allege that the Government “slash[ed] \$210
15 million in federal reimbursements to state and local jails that hold immigrants convicted

16 ¹ For example, as articulated in their Amended Complaint, Seattle enacted Ordinance 121063 and
17 Portland enacted ORS 184A.820.

18 ² For example, the AG Memo states that the “Executive Order’s definition of ‘sanctuary
19 jurisdiction’ is narrow” but finds that “nothing in the Executive Order limits the Department’s ability to
20 point out ways that state and local jurisdictions are undermining our lawful system of immigration or to
21 take enforcement action where state or local practices violate federal laws, regulations, or grant
22 conditions.” Dkt. # 34-1 at 3.

23 ³ *See also id.* at ¶¶ 129 (during his campaign, Donald Trump “said he . . . would withhold federal
24 funds to punish so-called sanctuary cities”), 130 (also during his campaign, Donald Trump “declared
25 that he would ‘block funding for sanctuary cities’ . . . and ensure that ‘[c]ities that refuse to cooperate
26 with federal authorities will not receive taxpayer dollars.’”), 131 (stating that President Trump “referred
27 to Seattle in particular as a ‘sanctuary city’ that would be a target of his administration.”), 132
28 (responding to a Seattle interviewer’s question, President Trump stated “that ‘sanctuary cities are out . . .
sanctuary cities are over.’ He added that ‘[t]he federal government is going to have to get involved and
they’re going to have to get involved very sharply.’”), 134 (“In a speech to congressional Republicans,
Defendant Trump declared: ‘And finally, at long last, cracking down on Sanctuary Cities.’”), 135
(President Trump stated “that he is ‘very much opposed to sanctuary cities,’ and that ‘[i]f we have to,
we’ll defund.’”), 136 (President Trump “explained that he had ‘ordered a crackdown on sanctuary
cities.’”), 139 (Attorney General Sessions “called on Congress ‘to make its first item of business the
immediate passage of legislation to cut off relevant federal monies to sanctuary cities.’”), 140 (Attorney
General Sessions “threatened that ‘[t]he Department of Justice will also take all lawful steps to claw back
any funds awarded to a jurisdiction that willfully violates 1373.’”).

1 of crimes while in the country illegally.” *Id.* at ¶ 141. “And a federal judge recently
2 stated that he had been warned by federal agents ‘to expect a crackdown on immigrants
3 in response to a new ‘sanctuary’ policy adopted by Travis County,’ Texas.” *Id.* Having
4 met the core criteria, the Court is satisfied that Plaintiffs’ claims are ripe under the
5 constitutional component of the analysis.

6 The prudential component of the ripeness inquiry asks courts to consider “both the
7 fitness of the issues for judicial decision and the hardship to the parties of withholding
8 court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). “A claim is fit
9 for decision if the issues raised are primarily legal, do not require further factual
10 development, and the challenged action is final.” *Standard Alaska Prod. Co. v. Schaible*,
11 874 F.2d 624, 627 (9th Cir. 1989). The Government asserts that Plaintiffs’ claims are
12 not fit for judicial decision because those claims are based on “several ‘contingent events
13 that may not occur as anticipated.’” Dkt. # 34 at 19 (citations omitted). But the clear
14 statements on record obviate the Government’s arguments in this respect. Though the
15 Government has not yet cut Plaintiffs’ federal funding, its public comments and failure to
16 legally cabin the Executive Order is enough to paralyze Plaintiffs and prevent them from
17 completing their budget processes. Statements by the President and his Attorney General
18 have not been equivocal regarding the efforts they have expressed against sanctuary
19 cities. The unbridled statements of the Government far exceed what can be characterized
20 as the mere jostling of words. The Government’s words present a clear and present
21 indication of what is in store for government funding for the cities of Seattle and Portland
22 for failure to comply with the Attorney General’s interpretation of Section 1373.⁴

23 This dovetails with the “hardship” element of prudential standing, which requires
24 a plaintiff to “show that withholding review would result in ‘direct and immediate’
25 hardship and would entail more than possible financial loss.” *Winter v. California Med.*

26
27 ⁴ The Executive Order is clear that the Attorney General “shall”—a nondiscretionary term—
ensure that sanctuary cities are not eligible for federal funds. EO § 9(a).

1 *Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989) (citations omitted). Plaintiffs met their
2 burden by showing that sizeable reductions in federal funding to the tune of a combined
3 \$204 million would result from the Government’s enforcement of the Executive Order.
4 *See, e.g.*, Dkt. # 27 (FAC) at ¶¶ 61, 83. At this juncture, Plaintiffs would be forced to
5 operate under a cloud of confusion. *Santa Clara I*, 2017 WL 1459081 at *21 (“Without
6 clarity the Counties do not know whether they should start slashing essential programs or
7 continue to spend millions of dollars and risk a financial crisis in the near future.”).
8 Plaintiffs need not wait for the Government to cut federal funding before bringing this
9 case. Accordingly, the Court finds that this matter is ripe for judicial determination.

10 **C. Standing**

11 The Government challenges Plaintiffs’ standing to bring their claims because “the
12 Cities’ alleged injuries are too speculative to meet the constitutional standing
13 requirement.” Dkt. # 34 at 21. Our standing doctrine is familiar: Plaintiffs must show
14 that they have suffered an “injury in fact” that is “fairly traceable to the challenged action
15 of the defendant,” and that “will be redressed by a favorable decision.” *Lujan v.*
16 *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations, citations, and alterations
17 omitted).

18 The Government argues that Plaintiffs’ injuries are too speculative to constitute
19 any kind of “injury in fact.” Dkt. # 34 at 22. However, as already analyzed under the
20 ripeness doctrine, Plaintiffs allege sufficient facts to show that the Government has been
21 unequivocal in its expressed intention to enforce the Executive Order. Consequently,
22 Plaintiffs have a “well-founded fear of enforcement” and therefore a well-founded fear of
23 losing many vital federally funded programs. *See Virginia v. Am. Booksellers Ass’n, Inc.*,
24 484 U.S. 383, 393 (1988). At this stage, this is enough to establish standing.

25 **D. Declaratory Judgment**

26 Plaintiffs’ first cause of action asks the Court for a determination that Seattle and
27 Portland comply with 8 U.S.C. § 1373. Dkt. # 27 (FAC) at ¶ 177-181. The Government

1 argues that Plaintiffs fail to identify a cause of action that authorizes such relief, and even
2 if Plaintiffs did identify an appropriate cause of action, the Government argues that
3 granting such relief amounts to an advisory opinion. Dkt. # 34 at 22.

4 The Declaratory Judgment Act, 28 U.S.C. § 2201, is available when there “is a
5 substantial controversy, between parties having adverse legal interests, of sufficient
6 immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland*
7 *Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (citing *Aetna Life Ins. Co. v.*
8 *Haworth*, 300 U.S. 227, 239-42 (1937)); *see also* 28 U.S.C. § 2201(a) (“In a case of
9 actual controversy within its jurisdiction . . . any court of the United States, upon the
10 filing of an appropriate pleading, may declare the rights and other legal relations of any
11 interested party seeking such declaration, whether or not further relief is or could be
12 sought.”). The Declaratory Judgment Act “is intended to allow earlier access to federal
13 courts in order to spare potential defendants from the threat of impending litigation.”
14 *Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996).

15 Plaintiffs’ Amended Complaint evidences a substantial controversy that is real and
16 immediate between the Cities and the Government. Specifically, Plaintiffs list certain
17 ordinances that the Government is likely to find violate Section 1373, as espoused in its
18 public statements in connection with the Executive Order that broadly interpret Section
19 1373. Plaintiffs need not wait for the Government to affirmatively name them as
20 “sanctuary cities,” embark on litigation seeking to invalidate Plaintiffs’ ordinances, or cut
21 Plaintiffs’ federal funding. Instead, Plaintiffs may “seek declaratory relief to resolve this
22 ‘real and substantial’ legal dispute.” *Santa Clara II*, 2017 WL 3086064 at * 12; *see also*
23 *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th
24 Cir. 1981) (“The Act permits parties so situated to forestall the accrual of potential
25 damages by suing for a declaratory judgment, once the adverse positions have
26 crystallized and the conflict of interests is real and immediate.”) (citing *Japan Gas*
27 *Lighter Assoc. v. Ronson Corp.*, 257 F.Supp. 219, 237 (D.N.J. 1966)).

E. Tenth Amendment

1
2 Plaintiffs claim that the Executive Order violates the Tenth Amendment’s anti-
3 commandeering rule. Dkt. # 27 (FAC) at ¶¶ 182-183. The Government argues that this
4 claim “rests on a misreading of the Executive Order,” or, alternatively, that Plaintiffs fail
5 to establish “that no set of circumstances exists under which the Order would be valid.”
6 Dkt. # 34 at 24 (quotations, citations, and alterations omitted).

7 The Tenth Amendment to the United States Constitution reserves to the States any
8 “powers not delegated to the United States by the Constitution, nor prohibited by it to the
9 States.” U.S. Const. amend. X. In doing so, the Tenth Amendment prohibits the Federal
10 Government from compelling “the States to enact or administer a federal regulatory
11 program.” *New York v. United States*, 505 U.S. 144, 188 (1992). “The Federal
12 Government may neither issue directives requiring the States to address particular
13 problems, nor command the States’ officers, or those of their political subdivisions, to
14 administer or enforce a federal regulatory program.” *Printz v. United States*, 521 U.S.
15 898, 935 (1997). The anti-commandeering principle prohibits both direct and indirect
16 coercion by the Government on the States. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567
17 U.S. 519, 578 (2012).

18 Plaintiffs’ Amended Complaint alleges facts sufficient for this Court to find that
19 the Government is likely to consider both Seattle and Portland to be “sanctuary cities.”
20 Dkt. # 27 (FAC) at ¶¶ 131, 145. As such, the Executive Order places the Cities at risk of
21 losing all of their federal funding. *See* EO § 9(a). Because these federal funds are
22 necessary for the functioning of the Cities, Plaintiffs “may have no legitimate choice
23 regarding whether to accept the government’s condition in exchange for those funds.”
24 *Santa Clara I*, 2017 WL 1459081 at *24. The Executive Order’s conditioning of federal
25 funds on the Cities’ enforcement of federal regulations falls directly within the ambit of
26 the Tenth Amendment. This kind of coercion is unconstitutional. *New York*, 505 U.S. at
27 187 (“But the Constitution protects us from our own best intentions: It divides power

1 among sovereigns and among branches of government precisely so that we may resist the
2 temptation to concentrate power in one location as an expedient solution to the crisis of
3 the day.”).

4 The Government argues that it will interpret the Executive Order in a
5 constitutional manner, and therefore Plaintiffs have not sufficiently argued that “no set of
6 circumstances exist under which the Order would be valid.” Dkt. # 34. But Plaintiffs
7 have alleged that the Government is already interpreting the Executive Order in an
8 unconstitutional manner. Moreover, the Government’s “gotcha” argument that Plaintiffs
9 could “simply decline to participate in the grant program” fails to take into account the
10 overwhelming necessity of federal funds for the Cities’ basic welfare.

11 **F. Spending Clause**

12 Plaintiffs allege the Executive Order violates the Spending Clause. Dkt. # 27
13 (FAC) at ¶¶ 184-187. Specifically, Plaintiffs aver that the Executive Order is
14 unconstitutionally coercive, places unrelated conditions on federal funds, and fails to
15 provide “adequately unambiguous notice to municipalities of the conditions that the
16 federal Executive Branch now would attach to the receipt of federal funds.” *Id.* The
17 Government argues that the Executive Order cannot violate the Spending Clause as it
18 directs the Executive Branch to exercise its existing power. Dkt. # 34 at 28. The
19 Government further argues that conditions attach only to those federal funds issued by
20 the Departments of Justice and Homeland Security—not to all federal funds—and
21 therefore there is nothing overly coercive or ambiguous about the Executive Order. *Id.* at
22 28-29.

23 The Spending Clause authorizes Congress to “lay and collect Taxes, Duties,
24 Imposts and Excises, to pay the Debts and provide for the common Defence and general
25 Welfare of the United States.” U.S. Const. art. I, § 8, cl. 1. “Incident to this power,
26 Congress may attach conditions on the receipt of federal funds, and has repeatedly
27 employed the power ‘to further broad policy objectives by conditioning receipt of federal

1 moneys upon compliance by the recipient with federal statutory and administrative
2 directives.” *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*,
3 448 U.S. 448, 474 (1980)). Congress’s power to attach conditions is limited in four
4 respects: (1) “exercise of the spending power must be in pursuit of ‘the general welfare’”;
5 (2) conditions must be unambiguous, “enabling the States to exercise their choice
6 knowingly, cognizant of the consequences of their participation”; (3) conditions must be
7 related “to the federal interest in particular national projects or programs; and (4)
8 conditions must be consistent with other provisions of the Constitution. *Id.* at 207-208
9 (citations omitted).

10 The Government avers that the AG Memo invalidates Plaintiffs’ Spending Clause
11 claim because the memo clarifies that, “[a]s a threshold matter, . . . the Executive Order
12 does not impose conditions on federal grant programming.” Dkt. # 34 at 28. The Court
13 already found, above, that the AG Memo is not binding authority. Though, if it were, by
14 the Government’s reasoning, it would effectively castrate the Executive Order: if the
15 Executive Order were merely telling the Executive Branch to “follow existing law,” then
16 the document would be rendered meaningless. Accordingly, taking the Executive Order
17 at its word, it conditions funding on jurisdictions’ compliance with Section 1373⁵, as
18 interpreted by the Attorney General or Secretary. EO § 9(a).

19 Without the AG Memo, the Government’s remaining arguments fall flat. The
20 Executive Order is ambiguous as Plaintiffs are unsure if they will be considered: (1) to be
21 “sanctuary jurisdictions”; or (2) in compliance with or in violation of Section 1373
22 considering the broad, public statements made by Government officials. Furthermore,
23 the Executive Order does not relate the conditions on federal funds specifically to Section
24 1373, or even generally to immigration, but rather requires certain, ambiguous conditions

25
26 ⁵ This is a generous reading of the Executive Order, which enables the Attorney General to “take
27 appropriate enforcement action against any entity that violates 8 U.S.C. § 1373, **or** which has in effect a
28 statute, policy, or practice that prevents or hinder the enforcement of **Federal law.**” EO § 9(a) (emphasis
added).

1 in order to receive *any* federal funding. EO § 9(a). The Executive Order fails to provide
2 an adequate nexus between its immigration-related enforcement conditions and grants of
3 funds, especially in light of evidence that Plaintiffs require federal funding for various
4 essentials unrelated to immigration, including infrastructure, healthcare, and affordable
5 housing. *See, e.g.*, Dkt. # 27 (FAC) at ¶¶ 60-96.

6 The Executive Order’s conditions are inconsistent with the Tenth Amendment. As
7 stated above, the conditions are unconstitutionally coercive; the Cities do not have
8 meaningful alternatives to accepting federal grants. *Dole*, 483 U.S. at 211 (“Our
9 decisions have recognized that in some circumstances the financial inducement offered
10 by Congress might be so coercive as to pass the point at which ‘pressure turns into
11 compulsion.’”) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).
12 Accordingly, Plaintiffs successfully pled their Spending Clause claim.

13 **G. Separation of Powers**

14 Plaintiffs allege that the Executive Branch has usurped Congress’s exclusive
15 power under the Spending Clause. Dkt. # 27 (FAC) at ¶ 189. Indeed, the Constitution
16 provides that “*Congress shall have Power To lay and collect Taxes, Duties, Imposts and*
17 *Excises[.]*” U.S. Const. art. I, § 8, cl. 1 (emphasis added); *see also Dole*, 483 U.S. at 206.
18 Under its constitutional authority, Congress enacted 8 U.S.C. § 1373. Congress did not
19 require states or cities to comply with Section 1373 as a condition to receive federal
20 funding.

21 Once Section 1373 became law, the Executive Branch was required to “take Care
22 that the Law be faithfully executed.” U.S. Const. Art. II, § 3, cl. 5; *see also Santa Clara I*,
23 2017 WL 1459081 at *21. Congress did not delegate to the President—whether
24 expressly, impliedly, or through acquiescence—any power or authority to condition
25 funding on compliance with Section 1373. *See Youngstown Sheet & Tube Co. v. Sawyer*,
26 343 U.S. 579, 585 (1952) (“The President’s power, if any, to issue the order must stem
27 either from an act of Congress or from the Constitution itself.”). Therefore, the President

1 did not have the authority to create new conditions on federal funding, or to withhold
2 funding based on his own interpretation of Section 1373. *See Youngstown Sheet & Tube*
3 *Co. v. Sawyer*, 343 U.S. 579, 637(1952) (Jackson, J., concurring) (“When the President
4 takes measures incompatible with the expressed or implied will of Congress, his power is
5 at its lowest ebb”); *see also Santa Clara I*, 2017 WL 1459081 at *22 (citing *City of*
6 *New York*, 524 U.S. at 439). The Executive Order’s “attempt to place new conditions on
7 federal funds is an improper attempt to wield Congress’s exclusive spending power and is
8 a violation of the Constitution’s separation of powers principles.” *Santa Clara I*, 2017
9 WL 1459081 at *22.

10 **H. Whether the Court Should Stay this Matter**

11 The Government is defending a nearly identical lawsuit to this one in the Northern
12 District of California. *See County of Santa Clara v. Trump, et al.*, No. 3:17-cv-00574-
13 WHO (N.D. Cal.). Much of the briefing and strategy in this matter appear to mirror that
14 of *Santa Clara*. The Court requests briefing from the parties regarding whether a stay in
15 this matter pending the outcome in *Santa Clara* is appropriate. If the parties agree on a
16 response, they may submit a joint brief not to exceed five (5) pages. If there is no
17 agreement, each party may submit their own responsive brief not to exceed five (5)
18 pages. Parties must submit these briefs within ten (10) days from the date of this Order.

19 **IV. CONCLUSION**

20 For the foregoing reasons, the Court **DENIES** the Government’s Motion to
21 Dismiss. Dkt. # 34. **As outlined above, the Court requests briefing from the parties**
22 **regarding a potential stay in this matter.**

23 DATED this 19th day of October, 2017.

24
25 

26
27 The Honorable Richard A. Jones
28 United States District Judge